

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED

May 15, 2012

In the Matter of DUNCAN, Minors.

No. 306821

Ingham Circuit Court

Family Division

LC Nos. 10-001069-NA

10-001070-NA

10-001071-NA

11-000430-NA

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Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

MURRAY, J (*dissenting*).

With all due respect to my colleagues, I would affirm the circuit court's order terminating respondent's parental rights to the minor children pursuant to MCL 712A.19b(3)(g), (h) and (n)(ii).<sup>1</sup> In particular, the trial court did not clearly err in finding that clear and convincing evidence existed establishing at least one statutory basis for termination under § 19b(3). *In re Trejo Minors*, 462 Mich 341, 350, 360; 612 NW2d 407 (2000); MCR 3.977(H)(3)(a). The clearly erroneous standard of review is a deferential one. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence. As the majority recognizes, the trial court did not clearly err in finding that respondent failed to provide proper care or custody for his children. It was undisputed that respondent was unable to care for his children due to his incarceration (he had been in jail, and then prison, continuously since July 2008), and that he left them with an unfit custodian without making arrangements to have another person care for the children. Additionally, the evidence supported the trial court's finding that respondent would not be able to provide proper care and custody for the children within a reasonable time because of the length of time he will remain

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<sup>1</sup> The majority correctly concludes that termination was not proper under MCL 712A.19b(3)(j).

incarcerated (another two and a half years from the termination decision)<sup>2</sup>, and because respondent admitted he would need at least *another year* from his release to get his “ship in order” and be prepared to take responsibility for the children.

Although our Supreme Court in *In re Mason*, 486 Mich 142, 160, 163; 782 NW2d 747 (2010), held that “[t]he mere present inability to personally care for one’s children as a result of incarceration does not constitute grounds for termination” of parental rights and that a respondent “could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration[.]” respondent had *not* taken steps to establish a limited guardianship with the grandmother, and even if she did remain the custodian for the duration of respondent’s incarceration, he admitted he needed at least another year from then to be able to provide care and custody. And, unlike the respondent in *Mason*, here respondent does not have employment or housing available to him upon his release from prison. Finally, the trial court’s finding that respondent’s past criminal conduct (including his admission that he sold illegal drugs in part to provide income for the family) did not bode well for his future success at caring for the children provided further support for the trial court’s conclusion. Therefore, the trial court did not clearly err in finding that “there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time” considering the children’s ages. Although only one factor need be upheld to affirm the trial court’s decision, *Trejo*, 462 Mich at 360, the trial court’s findings under § 19b(3)(h) and 19b(3)(n)(ii) were also not clearly erroneous.

With respect to § 19b(3)(h), as the majority notes that subsection contains the same elements as § 19b(3)(g), but with the added element that because of the parent’s incarceration “the child will be deprived of a normal home for a period exceeding” two years. *In re Mason*, 486 Mich 161, 164-165. Here, due to respondent’s incarceration, the children will be deprived of a normal home for a period exceeding two years. And, for the same reasons stated while addressing § 19b(3)(g), the trial court did not clearly err in finding that there “is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.”

In addressing § 19b(3)(n)(ii) respondent does not dispute that manslaughter committed with a firearm involves an element of force or threat of force or that, due to his prior felony convictions, he was subject to sentencing as an habitual offender.<sup>3</sup> Furthermore, the evidence supported the trial court’s determination that “termination is in the child’s best interests because continuing the parent-child relationship with the parent would be harmful to the child.” The trial

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<sup>2</sup> And, as the trial court noted, whether respondent is released on his earliest release date is questionable given his two misconduct charges for serious misconduct.

<sup>3</sup> The trial court did not terminate respondent’s parental rights solely because of his incarceration. Instead, it focused on respondent’s actions – both before and during his incarceration – to determine whether the statutory factors had been met. For that reason, as well as because respondent participated in all the trial court proceedings, this case is quite unlike *Mason*.

court found that maintenance of the parent-child relationship would be harmful to the children because respondent's poor decision-making created a risk of harm to the children. Aside from his convictions for carrying a concealed weapon, a drug offense, and the manslaughter sentence he is currently serving, respondent admitted to engaging in the sale of illegal narcotics to partially support the family. His poor judgment continued in prison, as reflected by his two misconduct tickets for serious misbehavior. These facts clearly support the trial court's finding, and certainly do not leave me with a definite and firm conviction that a mistake had been made. *Trejo*, 462 Mich at 350, 360. The majority's reversal is premised upon its disagreement with the factual assessments and findings of the trial court, which is not an appropriate basis upon which to reverse under this deferential standard of review. *BZ*, 264 Mich App at 296-297.

Finally, the trial court properly evaluated the children's best interests under MCL 712A.19b(5), and determined that the best interests of the children supported termination of respondent's parental rights. The evidence supported the trial court's finding that, except for the oldest child, there was no real parent-child relationship, and for all children, respondent had engaged in repeated poor choices that endangered the children and their ability to live in a safe environment. And, of course, the record squarely supports a finding that permanency was needed given respondent's admission that it would almost be four years until he could himself care for these children. *BZ*, 264 Mich App at 301; *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001); *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

For these reasons, I would affirm.

/s/ Christopher M. Murray